Pesticide & Toxic Chemical News

Few clues to decipher SCOTUS nominee Kagan's positions on environmental law

Monday May 17 2010
Volume: 38 Issue: 26

The lack of a paper trail regarding Elena Kagan's judicial philosophy has many stakeholders scratching their heads with regard to how the solicitor general President Obama nominated last week to the Supreme Court may rule on cases that either directly or indirectly impact pesticide, chemical and other relevant environmental laws.

Most of the attorneys contacted by Pesticide & Toxic Chemical News declined to comment, citing a lack of knowledge about her environmental positions. But a brief she filed as solicitor general in support of Monsanto in a Roundup Ready alfalfa case currently before the Supreme Court, as well as a 2001 Harvard Law Review article detailing and defending the growth of executive power through federal regulatory activity may provide some, if minimal, clues.

"I hope and believe Solicitor General Kagan will take a fair and reasoned approach in deciding cases in general, and environmental cases in particular, as a justice of the Supreme Court," Larry Ebner, head of the Appellate Practice Group at McKenna Long & Aldridge, tells Pesticide & Toxic Chemical News.

Ebner points to the brief filed by Kagan in Monsanto, et al. v. Geertson Seed Farms, et al. which was argued last month (see PTCN May 3, Page 6). Geertson et al. sued USDA's Animal and Plant Health Inspection Service (APHIS) in 2006 to force it to rescind its 2005 approval of Roundup Ready alfalfa, concerned it could contaminate nearby fields of conventional alfalfa. The U.S. District Court for the Northern District of California ruled APHIS had violated the National Environmental Policy Act (NEPA) by deregulating the crop without completing a full environmental impact statement (EIS). Monsanto intervened on the side of the government during the remedy phase, but the court issued an injunction banning all planting and sales of RR alfalfa seed until APHIS completed an EIS. Monsanto appealed, but the 9th Circuit Court of Appeals upheld the lower court's ruling. Monsanto appealed to the Supreme Court, which took the case.

The solicitor general's brief argues the district court was wrong to issue the injunction as it applied the wrong legal standard and presumed irreparable harm would result from APHIS's failure to comply with NEPA, stressing that the Supreme Court has repeatedly found a statutory violation by a government agency does not equal irreparable harm.

Kagan's brief doesn't challenge the correctness of some injunctive relief to correct the NEPA violation but says the court erred in rejecting APHIS's proposed measures, which included mandatory isolation distances between biotech and conventional alfalfa fields, in lieu of a ban on all future sales and planting until the EIS is completed.

"The injunction eliminates a choice for growers and consumers nationwide and intrudes on APHIS's regulatory role," the solicitor general's brief states.

That statement, according to Ebner, reflects the balanced approach he hopes Kagan will continue to take. "Environmental and pesticide cases are multi-dimensional, with real world impacts not only on the environment, but on growers, consumers and the economy," he says. "I hope that once she is a justice on the Supreme Court, she, along with the other justices, will take those factors into account."

Executive power

Kagan's broad interpretation of executive power in her 2001 "Presidential Administration" article in the Harvard Law Review that defended efforts by the Clinton administration to impose control over executive branch agencies has different implications for environmental laws "depending on who's in charge," **Glenn Sugameli**, a staff attorney at Defenders of Wildlife, tells PTCN.

As writer Jonathan Hiskes from the non-profit environmental news and commentary site The Grist notes, Kagan's interpretation could be a positive from an environmental standpoint if the executive branch is willing to act on an environmental issue before Congress. In the case of climate change regulation, Hiskes writes, "A justice who believes EPA should have leeway in enacting such rules is more likely to uphold them."

"It comes down to Chevron," **Sugameli** says, referring to the 1984 case, Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., in which the Supreme Court established a two-step test for determining whether to give deference to a federal agency's interpretation of a statute it administers.

"It's a double-edged sword," **Sugameli** says, meaning a justice who defers to an agency's interpretation of a statute could be a good thing if the agency is taking a pro-environment stance or a bad thing if the agency is taking an anti-environmental stance. He notes he has argued cases challenging regulations as too weak while industry has done the opposite. "Generally the government came out on top, with us in second, and industry in third," he says.

According to **Sugameli,** courts have gotten decisions wrong regarding environmental law because they haven't taken the time to understand how the relevant statute works. Instead, they rule the case presents a complicated issue, the government's argument is reasonable, and defer to the government.

"To do anything other than that, you have to get deeper into a case, and [Kagan's] willing and able to do that," he says, noting Kagan made environmental law a top priority while dean of Harvard Law School. "That's encouraging."

— Liz Buckley elizabeth.buckley@informa.com